

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

THE BON MARCHE, INC.

Employer

and

Case 19-RC-14337

TEAMSTERS LOCAL UNION NO. 760,
AFFILIATED WITH INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record¹ in this proceeding, the undersigned makes the following findings and conclusions:²

Summary

The Employer is an Ohio corporation engaged in the business of operating department stores, including a store in East Wenatchee, Washington, where it sells apparel, small electric equipment, house wares, and home merchandise on a retail basis. The Petitioner essentially seeks to represent a unit consisting of the Employer's START (Strategic Teams Achieve Results Together) Team employees at that store. In short, the Petitioner contends the START Team employees comprise the Employer's warehouse functions at the East Wenatchee store. START Team employees include the following classifications: placement associates and lead placement associate; processor associates and lead processor associates; signing associates; and lead receiving associate. The Employer contends the proposed unit is too narrow and argues that the only appropriate unit is a storewide unit that consists of all START Team employees, selling associates, and non-selling associates at the store. Based on the following facts and analysis, I find that the unit sought by the Petitioner is not an appropriate unit and I

¹ Both parties filed timely briefs, which were duly considered.

² The hearing officer's ruling made at the hearing are free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organization involved claims to represent certain employees of the Employer. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) of the Act and Section 2(6) and (7) of the Act.

shall, therefore, dismiss the petition unless the Petitioner submits a sufficient showing of interest in the storewide unit found appropriate within 14 days.

Background

The Employer opened its East Wenatchee store to the public in October 2001 and the employees commenced employment there the prior month. The store consists of two levels with approximately 36,000 square feet on each level.³ The Employer does not deliver merchandise from its store and does not operate delivery trucks at that location. Two days per week, merchandise that the Employer sells is delivered by trailer truck to the East Wenatchee store from The Bon Marche's Seattle Distribution Center. The merchandise is received and unloaded at a dock area of the Employer's store. The dock area encompasses approximately 1700 square feet and is located at one corner of and within the store's first level. There is no separate warehouse facility located on the store grounds or detached from the store. A number of stockrooms are also located within the store. Excess merchandise is stored in these stockrooms on a short-term basis. Pam Wright is the store's manager to whom the store's 10 managers report. She is also the second-line supervisor for all of the employees in the store.

START Team Employees

START Team employees⁴ are primarily responsible for unloading the merchandise and preparing it for sale on the sales floor. The processor associates and their lead(s) are responsible for unloading the merchandise, stripping away the plastic covering it, tagging it with security devices, and separating and organizing it by where it is to be placed on the selling floor. After the store closes and customers are not present, the processors move the merchandise from the dock to the appropriate departments on the selling floors. While they are engaged in their unloading and processing activities, the processor associates generally work from 12 noon to 5 p.m. If there is no truck to unload during a week due to a holiday, the processor associates work from 8 a.m. to 4 p.m. on the selling floor performing markdowns, straightening and refolding merchandise ("recovery" work), and replenishing merchandise. The lead receiving associate has the same duties as the processor associates, but is also responsible for tasks associated with the receipt and the return of the Bon Marche's Seattle Distribution trailer truck.

Once the merchandise has moved to the appropriate department, the placement associates and their lead(s) are responsible for physically placing the merchandise pursuant to the Employer's standards in each department of the store. They work from 5 a.m. to 1:30 p.m. and perform most of their placement duties between 5 a.m. and 10 a.m., when the store is closed to the public. Between 10 a.m., when the store opens, and 1:30 p.m. the placement associates work on the selling floor performing markdowns, recovery work, and replenishing merchandise, and assisting customers. The signing associates, who work from 5 a.m. until 1 p.m., obtain and display signs announcing events such as sales and major price reductions. They also promptly remove the signs once the events end and conduct audits to insure that the signs are communicating accurate information to the customer. Like the other START Team employees they also assist on the selling floor performing customer service and insuring that enough merchandise is properly displayed.

³ A separate employer leases an unspecified amount of space from the Employer within the store's fine jewelry department. Neither the Employer nor the Petitioner seeks to include the employees working for this separate employer in any unit found appropriate in this matter. Thus, the employees working for this separate employer are excluded from the unit found appropriate below.

⁴ These employees are also referred to as support staff or personnel in the record.

The Merchandise Team Manager is the START Team employees' first-line supervisor. She schedules and directs their work, and is the person responsible for performing their evaluations. As of the date of the hearing, there were approximately 15 START Team employees employed by the Employer at the East Wenatchee store.

Other Employees

The other employees whom the Employer contends belong in the unit are sales associates and non-sales associates. The sales associate classification includes various departmental and divisional sales associates; intimate apparel fitters or associates; selling specialists; counter managers; lead bridal consultant;⁵ beauty advisors; and the business office associates. The non-sales associates include the classifications of housekeeping employees; PVM Tech 2; and visual associates.

Sales associates sell the merchandise, service the customer, maintain and replenish merchandise, and assist in general upkeep of the store. Departmental sales associates are assigned to specific area of the store, while divisional sales associates have the same duties as the departmental sales associates but move throughout the store performing various selling functions. The intimate apparel fitter has the same selling duties, but is trained to fit bras. The selling specialists also have the same selling duties, but have exceeded certain productivity and customer service standards. Counter managers and beauty advisors are sales associates who seek to maximize sales in beauty treatment lines. The lead bridal consultant oversees the bridal registry area and engages in some sales of merchandise. The business office associates operate cash registers and sell gift-wrap, gift extras, and certain types of candy. They are also responsible for carrying cash bags to sales associates' registers in the morning and answering questions from customers and associates. Besides their basic selling duties, all of these sales associates are responsible for placement of merchandise, recovery and replenishing of merchandise, and performing markdowns. As the sales associates' first-line supervisor, the Group Sales Manager oversees their work and performs their evaluations.

The non-sales personnel have responsibilities with respect to the store upkeep rather than handling the merchandise that is sold. Housekeeping employees are responsible for cleaning the entire store area. There is one PVM Tech II, who is a maintenance person with additional electrical skills. The last non-selling associate at issue is the visual associate who is responsible for assembling fixtures and display of the large signs in the store announcing major sales events.

Comparison of the Two Groups of Employees

START Team employees receive the same cross-training as all other hourly employees, except that sales associates receive an additional 6 to 8 hours of training in order to complete sales transactions on the sales register (or terminal).⁶ START Team employees are paid the same wage rates as other associates through the first three steps of the Employer's wage scale, and earn 5 cents per hour more than sales associates through succeeding steps. START Team employees are not eligible for sales incentive bonuses that some sales associates can receive. Until a day or so before the hearing when the Employer changed their lunch break to one hour,

⁵ The parties stipulated that the counter managers and the lead bridal consultant are not supervisors under the Act.

⁶ Five current START Team employees received this additional training. At least three of those five received that training because they started initially as sales associates. The record is silent as to why the other two employees received that training.

START Team employees received a one-half hour lunch break while sales associates received a one-hour break. Benefits are otherwise the same for START Team employees and the other associates. START Team employees tend to wear more casual clothing, while the Employer expects sales associates to wear professional work attire.

As noted above, START Team employees perform some of the same functions on the selling floor as the sales associates when they are not unloading the trucks and getting the merchandise to the floor. Payroll expense transfer journal vouchers presented by the Employer also reveal that the Employer frequently assigns sales associates to START Team functions for several hours each month.⁷ Besides this evidence of temporary interchange, testimony established that several START Team employees have transferred into other positions and employees in other classifications have transferred into START Team positions. These transfers included employees who were hired and trained to be sales associates, but later transferred into START Team classifications and, to a more limited extent, START Team employees who transferred into sales and sales manager positions.

Analysis

In the instant case the Petitioner is seeking only the START Team employees and it is my function to determine if this grouping is an appropriate unit. The Petitioner argues that the START Team employees constitute *an* appropriate unit because of their alleged separate scope of work performed, separate supervision and training, different work hours and dress code, and somewhat different pay. The Employer, on the other hand, argues that a presumption favoring a single unit of selling and non-selling employees exists in retail store operations and that the Petitioner has failed to satisfy the factors that justify carving out a separate warehouse unit in a retail store. Although the Petitioner is correct that a petitioner need not seek the most appropriate unit, but only *an* appropriate unit, I find that the unit sought by the Petitioner is not an appropriate unit based on the principles set forth in *A. Harris & Co.*, 116 NLRB 1628 (1956), and the subsequent Board decisions applying that decision.

Initially I note that the employees sought by the Petitioner primarily receive and unload the merchandise, and move it to the floor for sale to customers. These are typical warehouse functions. See, e.g., *Frisch's Restaurants, Inc.*, 182 NLRB 544 (1970). I further note that it is undisputed that the Employer's store is solely a retail operation. In these circumstances, I must apply the principles set forth in *A. Harris & Co.*, *supra*, to determine whether the unit sought by the Petitioner is appropriate in a retail store. In *A. Harris* the Board set forth a restrictive test for deciding whether a separate unit of warehouse employees in the retail industry was appropriate. Pursuant to that test a separate unit of warehouse employees is appropriate only if 1) the warehouse operation is geographically separated from the retail store operations; 2) there is no substantial integration of warehouse employees with other employees in performing their ordinary duties; and 3) the warehouse employees are separately supervised. Although the Board's restrictive test was consistent with the Board's policy of favoring wall-to-wall units in the retail industry at that time, the Board continues to apply this test to retail operations in evaluating warehouse units. See, e.g., *Charrette Drafting Supplies Corp.*, 275 NLRB 1294 (1985); *Roberds, Inc.*, 272 NLRB 1318 (1984). Compare *A. Russo & Sons, Inc.*, 329 NLRB 402 (1999) (Although *A. Harris* principles criteria are appropriate in the retail industry, Board will not apply them to a mixed retail and wholesale operation).

⁷ Although some of the examples of payroll transfers involved seasonal employees, whom the parties agreed to exclude from the unit, there were several others who were not.

With respect to the first criterion that warehousing operation must be geographically separate from the retail store operations, the record reveals that the Petitioner has not carried its burden in this regard. In particular, the dock or receiving area, where most of the START employees perform the primary aspect of their work, is located within one corner of the store and is adjacent to the retail selling area. Thus, there is no physical separation or separate warehousing area. The fact that the dock area may be a separate primary work area for these employees within the same store is insufficient to satisfy this criterion. Rather, to satisfy the Board's first criterion of geographic separation, the START Team employees must perform their tasks in buildings geographically removed from that in which the bulk of the other employees work. *Roberds, Inc.*, 272 NLRB 1318, 1319 (1984). As the START Team employees are not geographically separated, I find that the Petitioner has failed to satisfy the first criterion for finding a separate unit of warehouse employees to be appropriate.

Regarding the second criterion, the record also demonstrates substantial and functional integration between the START Team employees and the Employer's other employees. The START Team employees regularly perform duties that sales associates perform except for actually ringing up the sale on the cash register. Thus, the evidence demonstrates that after the store opens, START Team employees (like sales associates) assist customers in locating and selecting merchandise, taking the merchandise to the register for the sales associate to ring up or scan, and arranging for the pick-up of the merchandise by the customer. The Employer has also called in the START Team employees who have received training on operation of the register to fill in if the Employer needs additional sales associates. Sales associates also perform START Team duties on a regular basis, including placement of merchandise and performing markdowns. If necessary, sales associates also occasionally go to the receiving dock area to pick up merchandise and move it to the selling floor. START Team and sales associates are both responsible for recovery and replacement of merchandise that has fallen or has otherwise become improperly displayed and they are all responsible for replenishment of merchandise from the stockrooms when supply runs low on the selling floor. In sum, it appears that everybody can do everyone else's job (except ringing sales on the registers) and will do so when necessary for customer satisfaction.

The record is also replete with examples of interchange of START Team personnel with other personnel on a temporary and permanent basis. Thus, the Employer presented evidence showing, for the four-month period preceding the hearing, START Team personnel performing visual merchandising and business office employee functions for several hours and sales associates performing START team and business office functions for several hours. Testimony also established that some sales associates have permanently transferred to START Team positions and START Team have permanently transferred to sales associates positions in the 16 months that the store has been open. In sum, the Petitioner has failed to demonstrate that there is no substantial integration of START Team employees with other employees of the Employer in performing their regular functions.

With respect to the Board's third and final criterion of separate supervision, the Employer argues that there is no separate supervision of the START Team employees because all employees ultimately report to the store manager. However, I disagree. The record is clear that the START Team employees report directly to their first-line supervisor, the Merchandise Team Manager, whereas the Group Sales Manager is the first-line supervisor of the sales associates. Thus, the Merchandise Team Manager schedules the START Team employees, directs them in their work, and performs their evaluations, while the Group Sales Manager performs the same functions for the sales associates. Thus, the Petitioner has shown that the START Team employees are separately supervised.

However, the Board requires that a petitioner satisfy all three *A. Harris* criteria in order to show that a separate warehouse in a retail operation is appropriate. *Sears Roebuck & Co.*, 117 NLRB 133 (1957). As shown above, the Petitioner has not shown that the Employer's warehouse operation is geographically separate from the retail operations and has not shown a lack of functional integration between the START Team employees and the other employees performing their regular duties. In these circumstances, I find that the Petitioner has failed to show that a separate unit of START Team employees is an appropriate unit in the Employer's retail store.

The Petitioner contends that *A. Harris & Co.*, *supra*, has no relevance here because that case decided only that a warehouse unit that was geographically separate from the retail store was appropriate. Contrary to the Petitioner's contention, the Board continues to apply the 3-factor test, set forth above, whenever it is confronted with the claim that a separate warehouse unit in a retail operation is an appropriate unit. I also find that the Petitioner's reliance on *John's Bargain Stores Corp.*, 160 NLRB 1519 (1966), to show that the Board no longer favors storewide units, is misplaced. The Board's decision in that case found that a separate warehouse unit was appropriate because the evidence satisfied the three *A. Harris* factors. Thus, that case supports my application of the three *A. Harris* criteria here. Finally, the Petitioner's reliance on recognition clauses set forth in collective-bargaining agreements at two other stores of the Employer is not persuasive because there is no evidence concerning the circumstances surrounding the recognition of the bargaining units at those stores, such as whether the Employer voluntarily agreed to those units.

Based on the above and the record as a whole, I find that the unit the Petitioner seeks is not an appropriate unit. Rather, I agree with the Employer that the only appropriate unit is a storewide unit excluding the classifications that the Employer and the Petitioner have stipulated out of the unit.⁸ Accordingly, I shall direct an election⁹ in the unit described as follows:

All full-time and regular part-time START Team employees, sales associates, and non-sales associates employed by the Employer at its East Wenatchee, Washington store, excluding all supervisors, managers, confidential employees, seasonal employees and guards as defined in the Act.

There are approximately 90 employees in the unit found appropriate which is larger than that requested by the Petitioner. In accordance with established Board practice, I shall allow Petitioner fourteen (14) days from the date of this Decision and Direction of Election in which to perfect its 30 percent showing of interest. In the event Petitioner does not establish a proper showing of interest in the larger unit, found appropriate, within the 14-day period, I shall dismiss the petition, unless it is withdrawn. Should the Petitioner not wish to participate in an election in the unit found appropriate herein, it may withdraw its petition without prejudice by giving notice to that effect to the Acting Regional Director within ten (10) days from the date of this Decision and Direction of Election.

⁸ The parties agreed to exclude all seasonal employees. Further, the parties stipulated to exclude the following classifications because they possess indicia of supervisory status as that term is defined by Section 2(11) of the Act and/or because they are managers as that term has been defined by Board law: loss prevention officers; general office administrator/human resource representative; merchandise team managers; visual managers; group sales managers; loss prevention managers; and business office/gift wrap managers. Accordingly, I shall exclude seasonal employees and the above-named supervisors and/or managers from the unit.

⁹ Although the Petitioner stated at the hearing that it was not seeking any alternate unit to the one sought, it is not clear whether the Petitioner stated that it was unwilling to go to an election in whichever unit I found to be appropriate. Had the Petitioner so indicated, I would dismiss the instant petition. As the record is not clear on that point, I am granting the Petitioner the opportunity to perfect its showing of interest in the larger unit found appropriate if it chooses to do so.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Teamsters Local Union No. 760, affiliated with International Brotherhood of Teamsters, AFL-CIO.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Acting Regional Director for Region 19 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. The Region shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the Regional Office, 915 Second Avenue, 29th Floor, Seattle, Washington 98174, on or before February 5, 2003. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (206) 220-6305. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

NOTICE POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by February 12, 2003.

DATED in Seattle, Washington, this 29th day of January 2003.

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